

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Keita v Minister for Immigration and Multicultural Affairs [2025]

FedCFamC2G 447

File number(s): SYG 110 of 2020

Judgment of: **JUDGE DOUST**

Date of judgment: 28 March 2025

Catchwords: **MIGRATION** – visa cancellation – holder of resident return visa and partner visa - non-compliance with requirement to answer all questions on visa application form – incorrect answers on visa applications – failure to disclose children of prospective wife –wife’s children to man other than husband – whether genuine spousal relationship between applicant and wife - where officer who made cancellation decision did not hold effective delegation from Minister – certificate under s 375A - application dismissed

Legislation: *Migration Act 1958* (Cth) ss 98, 99, 101, 101(a), 101(b), 104, 107, 108(a), 109, 109(1)(b), 109(1)(c), 109(2), 349, 375A, 415, 476, 477(1)
Migration Regulations 1994 (Cth) regs 1.15A, 2.41, 2.41(b)
International Convention on Civil and Political Rights
United Nations Declaration of Human Rights

Cases cited: *CSH18 v Minister for Home Affairs* [2018] FCCA 3226
LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (2024) 418 ALR 152; [2024] HCA 12
Minister for Home Affairs v CSH18 (2019) 269 FCR 206; [2019] FCAFC 80
Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Ahmed (2005) 143 FCR 314; [2005] FCAFC 58
SHJB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 134 FCR 43; [2003] FCAFC 303
Uddin v Minister for Immigration and Multicultural Affairs and Indigenous Affairs (2005) 149 FCR 1; [2005] FCAFC 218
Zubair v Minister for Immigration and Multicultural Affairs

and Indigenous Affairs (2004) 139 FCR 344; [2004]
FCAFC 248

Division:	Division 2 General Federal Law
Number of paragraphs:	104
Date of last submission/s:	5 February 2025
Date of hearing:	23 January 2025
The Applicant:	In person
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Mr K Eskerie, Sparke Helmore Lawyers
The Second Respondent:	Submitting appearance, save as to costs

ORDERS

SYG 110 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **ALHASSANE KEITA**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL**
 AFFAIRS
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE DOUST

DATE OF ORDER: 28 MARCH 2025

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE DOUST:

INTRODUCTION

1 The applicant, a citizen of Guinea, entered Australia in 2007 on a Prospective Marriage Visa and married an Australian permanent resident (**the wife**). He was subsequently granted a Partner visa and then a Resident Return visa.

2 The Resident Return visa was cancelled on 26 May 2017 after the (then) Department of Immigration and Border Protection became aware of birth certificates showing the applicant's wife had given birth to five children between 2004 and 2013, the father of each of whom was a man other than the applicant, who was recorded on the birth certificates of four of the children as living at the same address as the wife. The applicant had, in a series of visa application forms claimed to be in a genuine and continuing relationship with the wife between 1999 and 2010 and had not disclosed the wife's children when asked to identify her dependents. The delegate of the (then) Minister for Immigration and Border Protection determined that the applicant had contravened ss 101(a) and (b) and s 104 of the *Migration Act 1958* (Cth) (the **Act**) and proceeded to cancel the visa pursuant to s 109 of the Act.

3 That decision was affirmed on 18 December 2019 by the Administrative Appeals Tribunal (**Tribunal**), as it then was.

4 By his originating application lodged with the Court on 15 January 2020 (**the application**), the applicant seeks orders in the exercise of the Court's jurisdiction under s 476 of the Act in respect of the decision of the Tribunal (**decision**). The application contained a single ground:

My case in regards to the resident return visa has not been understood as there are errors in the decision summary. I need the opportunity in the courts to be able to justify the need for grant of the resident return visa.

5 The application was made within 35 days of the date of the Tribunal decision as required in s 477(1) of the Act, and accordingly there is no need to consider any application to extend time.

6 The matter was heard by the Court on 23 January 2025.

7 The Court received into evidence an affidavit of the applicant, in which the applicant essentially asserted the ground that appears above. The affidavit also attached a copy of the

decision along with the correspondence under cover of which the decision was sent to the applicant.

8 The Court also received into evidence, without objection, a court book comprised of relevant documents from the files held by the first respondent (**court book**).

9 In addition, the applicant tendered a number of documents, being character references from the applicant's work colleagues, a number of workplace certificates showing training, skills and competencies of the applicant, a national police certificate showing that the applicant had no criminal record, a bundle of taxation notices of assessment showing that the applicant had been earning an income and paying tax over many years, and a photograph of the applicant engaged in his work.

10 That material was admitted on a provisional basis, subject to objections as to relevance made by the first respondent.

11 The Court also had before it at the hearing written outlines of submissions prepared by the applicant and the first respondent.

BACKGROUND

12 The applicant is a citizen of Guinea, born in 1974. He was married in Guinea in 1996, and had two children, born 1997 and 1999 before the death of his wife in November 1999.

13 On 5 September 2003, the applicant lodged an application to migrate to Australia with the Australian High Commission in Nairobi, as the fiancé of an Australian permanent resident.

14 In the application, the applicant claimed that he had met his intended wife in Conakry in Guinea in September 1998 and had begun a relationship with her in December 1999. The applicant stated that the couple intended to marry in November 2003.

15 In the form 47SP accompanying the application, in a section of question 53, where the applicant was asked to identify the wife's children, the applicant provided no response.

16 The applicant entered Australia and was married on 22 September 2007.

17 In 2007, the applicant provided the (then) Department of Immigration a form 40SP, completed by his (then prospective) wife, which contained a statement that the applicant and the wife were in a genuine and continuing relationship which had commenced in 1999. At that time, the applicant also provided a form 47SP, in which form the applicant was asked to

provide his wife's details. The applicant did not make any entry where asked to list his partner's children, or where asked to list his partner's dependents. In that form the applicant answered that he and his partner intended to maintain a lasting relationship, and in response to another question answered that the relationship had not ceased. The applicant also provided a form 40SP which was completed by his wife and which contained her details as sponsor. That form stated that the wife had no dependents.

18 In September 2009, the applicant and the wife made statutory declarations that they were in a spousal relationship.

19 On 30 June 2011, the then Federal Magistrates Court of Australia made an order terminating the marriage of the applicant and his wife effective 31 July 2011.

20 In 2013, another citizen of Guinea made an application to migrate to Australia on the ostensible basis that she was the applicant's partner. The application form recited that she had met the applicant in Yataya River, Guinea in 2006, and that she and the applicant had committed to a shared life together on 15 August 2011.

Notice of Intention to Consider Cancellation – 24 March 2017 (Notice of Intention)

21 On 24 March 2017, an officer of the (then) Department of Immigration and Border Protection wrote to the applicant, purporting, as the delegate of the Minister for Immigration and Border protection, to give the applicant notice that she did not consider that the applicant had complied with ss 101(a), 101(b) and 104 of the Act, and that if that was the case, the applicant's Class BB Subclass 155 Resident Return visa may be cancelled pursuant to s 109 of the Act (**the notice of intention**).

22 Section 101 of the Act provides as follows:

Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

23 Section 104 of the Act provides as follows:

Change in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in

writing of the new circumstances and of the correct answer in them.

- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

24 It is important to note the operation of ss 98 and 99 of the Act.

25 Section 98 provides as follows:

Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

26 Section 99 provided (at the relevant time) as follows:

Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment Authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

27 Subsequent amendments to the section have changed the Tribunal reference, and deleted the reference to the Immigration Assessment Authority. The section remains the same in substance and effect.

28 Section 109 of the Act provides as follows:

Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be

circumstances in which a visa must be cancelled.

29 The notice of intention set out the history of the applicant's applications for visas, noting:

- (1) That in the form 47SP, lodged with the applicant's visa application in 2003, he had not provided a response to question 53 where he was asked to list his partner's children;
- (2) That in the form 40SP lodged with the applicant's visa application in 2003, the applicant's wife had answered "No", to the question about whether she had any dependents;
- (3) That in support of the applicant's prospective marriage visa application in 2007, the applicant had provided a form 40SP completed by his prospective wife. In the form she had identified her residential address, and stated she had no dependents;
- (4) That on entry to Australia on 7 August 2007, the applicant had provided his prospective wife's residential address as his intended address in Australia;
- (5) That in October 2007, the applicant had lodged an application for a Partner visa, in support of which he had lodged a form 47SP which he had completed and a form 40SP which had been completed by his wife. The applicant had left the form 47SP blank where it asked to list the children of his wife, and had answered questions about the relationship with his wife in a manner to indicate that the relationship was ongoing. The applicant's wife had provided similar responses on her form 40SP;
- (6) That in August 2009, the applicant and the wife were asked to provide further information in support of the applicant's visa application, in response to which the applicant and his wife had provided statutory declarations as to their continuing marital relationship;
- (7) The applicant was granted his Subclass 801 Partner (Permanent) visa on 16 February 2010; and
- (8) In support of his application for divorce, the applicant had stated that he and his wife had separated on 1 March 2010. Following the applicant's divorce taking effect on 31 July 2011, the applicant claimed, in his application to sponsor his new partner, that he and his new partner had committed to a shared life together on 15 August 2011.

30 The notice of intention also set out the following history:

- (9) That on 9 November 2004, the applicant's then prospective wife had given birth to twins. The birth certificates for the children recorded that the father of those children was not the applicant and was resident at the same address as the applicant's wife;
- (10) That on 5 September 2007, the applicant's then prospective wife had given birth to a third child. The birth certificate for the child recorded that the father of those children was the same man recorded as father of the twins and also recorded that he was resident at the same address as the wife;
- (11) That on 3 January 2011, the wife had given birth to a fourth child. The birth certificate for that child recorded that the father of those children was the same man recorded as father of the three earlier children. The birth certificate recorded a residential address for the father that was different to that recorded for the wife; and
- (12) That on 4 September 2013, the wife had given birth to a fifth child. The birth certificate for that child recorded that the father of those children was the same man recorded as father of the four earlier children. The birth certificate recorded a residential address for the father that was the same as that recorded for the wife.

31 The notice of intention stated that on the basis of that information, it appeared that during the period the applicant claimed to have been in an ongoing spousal relationship with the wife , she had in fact been in an ongoing spousal relationship with the man who was the father of her five children, and accordingly, the applicant did not meet the definition of "spouse" as provided in reg 1.15A of the *Migration Regulations 1994* (Cth) (**Regulations**).

32 The letter identified the following possible instances of non-compliance by the applicant:

- (13) Possible non-compliance with s 104 of the Act by the applicant's failure to:
 - (a) Advise the Department, following his visa application in September 2003 and before the applicant's arrival in Australia, that his then prospective wife had given birth to twins in November 2004; and
 - (b) Advise the Department that the applicant's prospective wife was in a de facto relationship with the father of her twins.
- (14) Possible non-compliance with s 101(a) of the Act by the applicant's failure to:
 - (a) Answer question 70 of form 47SP, and question 12 of form 40 SP lodged in respect of the application for a Partner visa made on 29 October 2007. Those

questions had asked the applicant and his prospective wife to state when and where the applicant and his wife had commenced a spouse relationship.

(15) Possible non-compliance with s 101(b) of the Act by the applicant's:

- (a) Incorrect answer at question 12 of form 40SP, lodged on 13 June 2007 that the applicant and his prospective wife had a mutual commitment to a shared life to the exclusion of any other spousal relationship;
- (b) Incorrect answer at question 37 of form 40SP, lodged on 13 June 2007, that the applicant's then prospective wife had no dependents;
- (c) Incorrect answer at question 60 of form 47SP, lodged in respect of the application for a Partner visa made on 29 October 2007, that the applicant's wife had not previously been in a de facto relationship;
- (d) Failure at question 65 of form 47SP, lodged in respect of the application for a Partner visa made on 29 October 2007, to provide details of the applicant's wife's children, and incorrectly advising at question 37 of form 40SP that the applicant's wife had no dependents; and
- (e) Incorrectly declaring in a statutory declaration dated 15 September 2009 that the applicant and his wife had a commitment to a shared life as husband and wife to the exclusion of all others, when the applicant's wife was in a spousal relationship with the father of her children.

33 The notice of intention advised the applicant that if he had failed to comply with the requirements of ss 101(a), 101(b) and/or 104 of the Act, his visa may be cancelled under s 109 of the Act. The notice of intention gave the applicant fourteen days to provide a response providing reasons:

- (16) Why the applicant considered he had complied (or not complied) with the requirements of ss 101(a), 101(b) and/or 104 of the Act;
- (17) Why the applicant's visa should not be cancelled; and
- (18) Any supporting evidence.

34 The notice of intention advised the applicant that if he did not respond within the time frame, a decision may be made to cancel his visa using information already held by the Department. The letter also referred the applicant to reg 2.41 of the Regulations, which sets out the matters the delegate must consider.

Applicant's Response – 5 April 2017

35 The applicant provided a response to the notice of intention on 5 April 2017 through his then lawyers. In summary, the applicant submitted, as to the substance of the alleged incorrect statements and omissions, that:

- (19) He was unaware that the wife had given birth to twins in 2004 as he was not in Australia at the time;
- (20) Apart from the birth certificates, there was no evidence that the applicant's wife was in a de facto relationship with the father of her children and the Department had failed to consider the possibility that the birth certificates were based on fraudulent information;
- (21) Even if the father of the children was living at the same address as the applicant and the wife, it does not follow that the wife and the father of her children were in a de facto relationship;
- (22) The applicant had not understood the question about "dependents" as English was not his first language. He had understood those questions to enquire whether his wife was dependent on someone for her everyday living;
- (23) It does not follow from the fact two parties live together at the same address that they are in a de facto relationship; it is common practice in the African community for people to live in share households; and
- (24) Even if the wife and the father of her children had sexual relations and conceived several children, it does not follow that they were in a de facto relationship. It may have been the case that the father was merely assisting the wife to conceive children.

36 As to the discretionary considerations, the applicant submitted that:

- (25) He and his dependent children had lived in Australia for 10 years and had developed strong ties in Australia;
- (26) The applicant's children would be adversely affected by cancellation of the applicant's visa, and it was in their best interests that they and the applicant remain in Australia. The applicant cited the *Convention on the Child* (sic);
- (27) This was the first occasion on which he had come to the attention of the Department. He had no prior warnings or relevant notices and had not had the opportunity to remedy any potential problems; and

(28) The cancellation of the applicant's visa would compromise the applicant's family unit, which is recognised by the *International Convention on Civil and Political Rights* and the *United Nations Declaration of Human Rights* as a fundamental unit of society.

Applicant's visa cancelled – 26 May 2017

37 By letter dated 26 May 2017, an officer of the Department wrote to the applicant advising that she had decided to exercise her discretion pursuant to s 109 of the Act to cancel his Subclass 155 Resident Return visa. That letter attached a decision record.

38 As the discussion below reveals, that decision was made without the officer holding a delegation from the Minister to exercise that discretion, however, that fact did not come to the applicant's attention until the matter was before the Tribunal.

Application for review – 29 May 2017

39 The applicant made an application to the Tribunal for review of the cancellation decision on 29 May 2017.

40 During the course of the proceeding before the Tribunal the following events ensued.

41 First, on 19 June 2017, the officer who had purported to make the decision cancelling the applicant's visa wrote to the District Registrar of the Tribunal giving a certificate and notification regarding disclosure of certain information under s 375A of the Act. That letter certified that disclosure to a person other than the Administrative Appeals Tribunal of the information contained in certain listed folios in Departmental file number BCC2015/212744 would be contrary to the public interest. The letter then identified, in respect of various of the folios, the reasons for regarding their disclosure as contrary to the public interest, in summary, that they:

- (a) identified a confidential informant;
- (b) contained information about internal departmental working methodologies which if released to the public could hamper future departmental efforts to obtain information;
- (c) contained information identifying minor children;
- (d) contained an identification document of a third party;
- (e) contained the visa applications of third parties; and
- (f) referenced a visa application of a third party.

42 When the Tribunal issued an invitation to the applicant to attend a hearing, it provided the applicant with a copy of the certificate and invited him to provide submissions on its validity.

43 The Tribunal's decision recorded that the applicant did not make any submission as to the validity of the certificate. The Tribunal reasons then recorded that the gist of the material the subject of the certificate was ventilated with the applicant. The applicant did not make any submission to the Court which challenged either statement.

44 Second, on 12 December 2017, the Tribunal wrote to the applicant and advised that the (then) Department of Immigration and Border Protection had told the Tribunal that the officer of the Department who made the decision to cancel the applicant's visa did not have the delegated power to cancel visas under s 109 of the Act when they made the decision to do so. The Tribunal advised that it was considering making a "guidance decision" about the issue.

45 The Tribunal wrote again to the applicant on 19 June 2018 advising that it had received a submission from the (then) Department of Immigration and Border Protection about the delegation question, which submission contended that decisions to cancel visas that had been made by officers without delegation stood until such time as they were set aside (notwithstanding the deficiency of the delegation), and that the Tribunal had jurisdiction to exercise all of its powers on the review application. The letter also advised that there was a matter before the then Federal Circuit Court of Australia in which the question was being ventilated.

46 The Tribunal advised that it intended to await the outcome of those proceedings before determining whether to issue a guidance decision.

47 On 21 January 2019, the Tribunal wrote again to the applicant advising that the matter before the Federal Circuit Court of Australia had been determined in *CSH18 v Minister for Home Affairs* [2018] FCCA 3226. However, the Tribunal advised that the Minister for Home Affairs had lodged an appeal from that decision, and the Tribunal had decided not to make a decision in the applicant's case until such time as that appeal was finalised.

48 On 4 July 2019, the Tribunal wrote to the applicant advising that the Federal Court had determined the appeal in *Minister for Home Affairs v CSH18* (2019) 269 FCR 206; [2019] FCAFC 80 (*CSH18*) (although the reference in the letter erroneously gave the citation as [2018] FCAFC 80). The Tribunal advised that the Federal Court decided that the Tribunal had jurisdiction to review the decision and in doing so had all the powers of the original

decision-maker as if they had been properly delegated. The letter stated that the judgment did not provide clear authority on whether the Tribunal had the power to affirm a decision to cancel a visa which was made by a person not properly authorised. The letter stated that the Tribunal's powers on review were those set out in s 415 of the Act and included the power to affirm, set aside, and substitute a decision. It advised it was considering the decision in *CSH18* and that the applicant's case would be allocated to a member in due course.

49 On 29 October 2019, the Tribunal wrote to the applicant inviting him to attend a hearing on 11 December 2019. In that letter, the Tribunal invited the applicant to provide submissions as to the validity of the certificate that had been issued pursuant to s 375A of the Act.

50 By a further letter on 29 October 2019, the Tribunal also wrote to the applicant advising that the Tribunal had, on 28 August 2019, invited the Secretary of the (now) Department of Home Affairs to make a submission to the Tribunal as to whether it had the power to affirm a decision to cancel a visa made by a person without delegation. The letter advised that the Department had provided a submission about that question, attached a copy of the submission, and invited the applicant to make any comments in relation to that submission.

51 The attached submission contended that *CSH18* was clear authority for the proposition that the Tribunal had power to affirm a decision to cancel a visa that was made without proper delegation.

52 The applicant ultimately attended a hearing before the Tribunal on 11 December 2019.

53 The Tribunal gave its decision on 18 December 2019.

The Tribunal's Decision

54 The Tribunal decided to affirm the decision to cancel the applicant's Subclass 155 Five Year Resident Return Visa.

55 In its reasons the Tribunal recited at length the history of the matter as it had been related in the letter from the Department to the applicant dated 24 March 2017, summarised the submissions that had been made by the applicant in response to that letter, and then summarised the decision of the officer who made the decision under review, whom the Tribunal referred to as the "delegate" notwithstanding the issues with the delegation of power to that officer. The Tribunal set out the findings the delegate made about the applicant's non-compliance with the Act, and then summarised the delegate's conclusion as follows (at [15]):

the delegate found that the possible hardship to the applicant and his children as a result of the cancellation was outweighed by the considerations in favour of cancelling his visa.

- 56 At [17] of its reasons, the Tribunal member said that when the Tribunal issued an invitation to the applicant to attend a hearing, it had provided the applicant with a copy of the certificate issued pursuant to s 375A of the Act and invited him to provide submissions on its validity. The applicant did not make any submissions as to the validity of the certificate.
- 57 The Tribunal also recorded (at [19] of its reasons), that it had conveyed the gist of the information in the documents the subject of the certificate, and said that any issues which were the subject of the certificate would be discussed with the applicant.
- 58 The Tribunal then set out the evidence the applicant had given the Tribunal about his present living circumstances, and the circumstances of his children.
- 59 The Tribunal asked the applicant about the father of the wife's children, and the applicant responded that he had never lived with them. However, he denied that the wife had ever been living with the man. The applicant said that incorrect information had been put in the birth certificates because the man recorded as the father was not an Australian citizen.
- 60 The Tribunal asked the applicant why he had neglected to include the details of the wife's children in his application for the Partner visa. The applicant explained that he had thought the question was about children of his deceased wife in Guinea, and had left the question blank, and then forgotten that he had done so. The Tribunal rejected that explanation as not plausible, given he had provided information in the application about the sponsor's other family members.
- 61 The applicant said that he had been in Australia for 10 years and would not know what to do if he had to return to Guinea. He claimed that he had been in a genuine relationship with his wife and had been reliant on her to complete the documents.
- 62 The applicant said that he was sorry for not informing the Department of the correct information and said it would not happen again.
- 63 The Tribunal found that the delegate had reached the necessary state of mind to engage s 107 of the Act and that the notice (of intent to cancel the visa) had satisfied the statutory requirements.

- 64 The Tribunal was satisfied that the applicant had not complied with s 104 of the Act by failing to notify the Department of the fact that his prospective wife had given birth to twins. It did not accept the applicant's claims that he had not been aware of the fact that the wife had had twins because he was in Guinea at the time, as the applicant and his prospective wife had co-operated in making the visa application, including pursuing a review in the Tribunal. The Tribunal noted in any event that the applicant became aware of the children upon his arrival in Australia. The Tribunal did not accept the applicant's claimed explanation of ignorance of the requirement to notify the Department of a change in circumstances. Any such ignorance did not mean that the requirements of s 104 had been met.
- 65 The Tribunal also found that the applicant had not complied with s 101 of the Act by his failure to provide information as to his wife's children in the application for Partner visa he submitted in October 2007, after he arrived in Australia and was married to the applicant. The applicant's wife had given birth to a third child in September 2007.
- 66 The Tribunal rejected the applicant's explanation that he had misunderstood questions about his partner's children, as he had provided information about the wife's other family members.
- 67 The Tribunal found that the applicant had deliberately failed to provide the correct information because if he had provided that information that would have undermined his claim that he had been in a genuine and continuing and exclusive relationship with the sponsor (that is, the wife).
- 68 The Tribunal also found that the information provided in the form 40SP signed on 29 May 2007 provided by the applicant's then prospective wife failed to comply with s 101 of the Act, as it had failed to disclose her dependent children. The form 40SP signed by the wife on 22 October 2007 in support of the applicant's Partner visa application had also declared that the wife had no dependents, and did not list her dependent children. By that failure the Tribunal found the applicant had failed to answer all questions and had provided incorrect answers and had not complied with s 101 of the Act.
- 69 The Tribunal was satisfied, based on the information contained in the birth certificates, that the wife was living with the father of her children at the time of the birth of the third child in September 2007 and was in a continuing relationship with him at the time the applicant's Partner visa application was filed in October 2007. In the applicant's Partner visa application he had failed to answer a question as to when and where his relationship with his wife had

commenced, but had claimed that he was her spouse. The Tribunal was satisfied that answer was incorrect, as a spousal relationship involves a mutual commitment to a shared life to the exclusion of all others. The Tribunal was satisfied the applicant had failed to comply with s 101 of the Act.

70 The Tribunal was not satisfied that it could make a positive finding that the information provided by the applicant and the wife in their September 2009 statutory declarations was incorrect. The Tribunal noted that the information contained on the birth certificate of the wife's fourth child was that the child's father was living in a different residence to the wife. However, on the birth certificate of the fifth child, the applicant's by then ex-wife, and the father gave the same residential address. Given that the applicant and the father of her children were not living in a shared residence at the time of the birth of the fourth child, and given the absence of clear evidence about the nature of the relationship between the birth of the third child in September 2007 and the fourth child in January 2011, the Tribunal considered that it appeared there were at least some periods of separation between the two.

71 Although the Tribunal had concerns that the applicant had ever been in a genuine relationship with the wife, it could not be satisfied on the basis of the birth certificates that as at the time of the September 2009 statutory declarations that the wife was in a relationship with the father of her children, and was not satisfied that the statements in those statutory declarations were incorrect.

72 Having satisfied itself that the applicant had not complied with both ss 104 and 101 of the Act, in ways that had been described in the notice given to the applicant under s 107 of the Act, the Tribunal then turned to consider whether the applicant's visa should be cancelled, noting that cancellation was discretionary given that no mandatory cancellation circumstances had been prescribed under s 109(2) of the Act.

73 The Tribunal then considered in turn the circumstances which are prescribed in reg 2.41 of the Regulations for the purposes of s 109(1)(b) and (c) of the Act.

74 It first considered the correct information, namely, that after the applicant applied for his prospective marriage visa and before he entered Australia, that his prospective wife had twins, and was pregnant with a third child to the same father. The Tribunal considered that the correct information was that at the time of the application, the sponsor (that is, the wife) was in a genuine and continuing relationship with the father of her children.

- 75 The Tribunal noted that there was no “genuine document” in the present matter, and so the circumstances prescribed in reg 2.41(b) of the Regulations did not arise.
- 76 The Tribunal then considered whether the decision to grant the visa was based wholly or partly on incorrect information and was satisfied that was the case. It noted that the relationship between the applicant and the sponsor was a criterion for the grant of the Prospective Marriage visa and the Partner visa. The fact that the sponsor had children with a man other than the applicant, and was living with that other man, was evidence that the applicant did not have a genuine and continuing relationship with the sponsor.
- 77 Had the applicant disclosed that his sponsor had two children to another man in his application for the Prospective Marriage visa it is unlikely the visa would have been granted.
- 78 Had the information about the wife’s three children been disclosed in the application for the Partner visa, it was unlikely the applicant and his wife would have been found to be in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others. The decision to grant the visa was based wholly or partly on the incorrect information that the wife did not have any children.
- 79 Considering the circumstances in which the non-compliance had occurred, the Tribunal did not accept the applicant’s claims about confusion about the questions, or lack of knowledge about the wife’s children. The Tribunal found that the applicant deliberately failed to provide the information as he was aware the information would show he was not in a genuine and continuing relationship. He deliberately failed to answer questions and gave incorrect information to obtain an immigration outcome.
- 80 The Tribunal found the applicant had continued to provide false information in response to the visa cancellation notice.
- 81 The Tribunal then considered the applicant’s present circumstances, noting he had lived in Australia for over 12 years and would be expected to have cultural and community ties. The Tribunal noted that the applicant provided limited information about his adult children, who were living independently of him. The Tribunal noted that the applicant’s children would not have their visas cancelled if the applicant’s visa was cancelled.
- 82 The Tribunal noted the applicant’s current wife lived in Guinea and would provide him with emotional support if he returned there.

83 Considering the applicant's subsequent behaviour, the Tribunal noted the applicant's implausible claims that the birth certificates of the applicant's wife's children were based on fraudulent information and that he had been confused about whether to provide information about his partner's children. The Tribunal concluded that the latter claims did him no credit.

84 The Tribunal noted there were no other instances of non-compliance with the requirements of the applicant's visa and that he had been present in Australia for 12 years.

85 There was no information to indicate that the applicant was not law abiding.

86 The Tribunal noted that the applicant has been employed in a factory, but noted there was little other evidence of the applicant's contribution to the community.

87 The Tribunal then turned to consider other issues. First, it considered the position of the applicant's two adult children, and concluded that their visas would not be affected by cancellation of the applicant's visa. If they were separated from their father, such separation would cause them some difficulty, but it would not breach any of Australia's international obligations.

88 The Tribunal accepted it was likely the applicant would be required to depart Australia, and would face harsher economic conditions if required to return to Guinea, and that would affect his capacity to support himself and his wife in Guinea.

89 Considering the circumstances of the applicant both individually and cumulatively, the Tribunal accepted that if the applicant's visa were cancelled he would suffer a decrease in living standards that could adversely affect his capacity to provide for his wife and result in separation from his children. Against that, the Tribunal was satisfied that the applicant had deliberately deceived the Department to obtain an immigration outcome, and considered it appropriate to place significant weight on that conduct. The Tribunal stated that the integrity of Australia's immigration laws rely on applicants providing correct information, and the applicant's conduct was taken over an extended period, and was deliberate and planned and undertaken in conjunction with the sponsor to deceive the Department. The Tribunal considered the applicant's expressed sorrow to be regret that he was facing the consequences of his actions rather than regret for his deliberate actions to deceive the Department.

90 The Tribunal concluded that the applicant's visa should be cancelled, and affirmed the decision to cancel the applicant's Subclass 155 Five Year Resident Return visa.

THE PROCEEDING IN THIS COURT

91 The applicant's originating application specified a single ground:

My case in regards to the resident return visa has not been understood as there are errors in the decision summary. I need the opportunity in the courts to be able to justify the need for grant of the resident return visa.

92 The applicant appeared at the hearing of his application without any legal representative. He had the assistance of an interpreter in the French language.

93 Shortly after the commencement of the hearing, the Court explained, to the extent possible where an interpreter is used to communicate complex legal concepts to person without legal training, the limits on the Court's role. The applicant was advised that the Court could not make a decision to give him back his visa, and that it could only intervene and send the matter back to the Tribunal to consider again where there has been a jurisdictional error by the Tribunal.

94 It was apparent from both the applicant's submissions, as well as the ground in the applicant's application, that the applicant sought to have the Court reconsider his application on the merits.

95 First, the applicant tendered a number of character references, workplace certificates, a recent national police certificate showing that the applicant had no disclosable court outcomes, a series of taxation notices of assessment, and a photograph of the applicant at work appearing to use a brazing torch. They were admitted provisionally, subject to the applicant demonstrating their relevance to the question before the Court, namely, whether there had been jurisdictional error on the part of the Tribunal.

96 Second, the applicant submitted that there were a lot of things that he did not understand with all the applications, and that he had been unaware when he was in Guinea that his prospective wife in Australia had given birth. Those submissions repeated submissions that had been made by the applicant in the Tribunal.

97 To the extent that the applicant was inviting the Court to consider again whether the applicant had in fact failed to comply with the requirements of either s 101 or s 104 of the Act, it is an invitation the Court may not accept. The non-compliance was not the jurisdictional fact which enlivened the Minister's direction to cancel the applicant's visa and the Tribunal's power on review to affirm that decision. Rather, the satisfaction of the Minister and the Tribunal in each case, after considering the applicant's response as required by s 108(a) of the

Act, that there was non-compliance in the way described in the notice of intention, enlivened that discretion: *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 43; [2003] FCAFC 303 at [17] – [21]. As such, it is not for the Court to determine for itself whether the applicant had failed to comply with either ss 101 or 104; rather, its review of that conclusion by the Tribunal is limited to one directed to the identification of jurisdictional error in the Tribunal’s review process and/or the making of the Tribunal’s decision. That is, the questions for this Court are whether the Tribunal breached an express or implied condition that applied to the making of the decision by misunderstanding the applicable law, asking the wrong question, exceeding the bounds of reasonableness, identifying a wrong issue, ignoring relevant material, relying on irrelevant material, making an erroneous finding, reaching a mistaken conclusion, failing to observe some relevant requirement of procedural fairness or erring in some other way, and if so, whether such error was material to the outcome, such that it should have the consequence that the decision lacks legal force: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* (2024) 418 ALR 152; [2024] HCA 12 at 154 [3], [4], [7].

98 The applicant also submitted that he was a law abiding and peaceful person by nature, and that the decision to cancel his visa would cause him a great deal of pain. That submission was an invitation to the Court to consider again whether the discretion to cancel the applicant’s visa should be exercised. That invitation may not be accepted, no matter how persuasive the evidence as to the applicant’s conduct since his non-compliance with the Act, or how sympathetic his personal circumstances. On a review pursuant to s 476 of the Act, it is not for the Court to exercise the Minister’s discretion afresh. Review of the exercise of such discretion is limited to the identification of an error which resulted in the discretion miscarrying. In the present matter, the Tribunal (at [41]) heard, but rejected, the applicant’s explanation that he was unaware that his prospective wife had children. It did not accept (at [42]) his explanation that he had not been aware of his obligations. It heard, but did not accept (at [46]-[47]) his claim that he had not understood the questions which required him to disclose his wife’s children. It dealt with the applicant’s claims concerning the circumstances surrounding his provision of incorrect information and his failure to provide the correct information.

99 The Tribunal had regard to the applicant’s contribution to the community through his work (at [92] – [93]) and the adverse impact upon both the applicant, his present wife and children of

the cancellation of his visa (at [94] – [96]). Ultimately, in the exercise of its discretion, the Tribunal gave greater weight (at [97] – [100]) to its findings that the applicant had engaged in deliberate conduct in concert with another person to deceive the Department to obtain an immigration outcome in reaching its conclusion to cancel the applicant’s visa. The weight to be given to those competing considerations was a matter for the Tribunal. The Tribunal’s exercise of its discretion was a conventional one which fell within the scope of the Tribunal’s decisional freedom. The Court does not discern any error in the Tribunal’s approach to the exercise of that discretion.

100 During the hearing the Court raised with counsel for the first respondent its concern arising from the absence of an effective delegation from the Minister to the officer of the Department who purported to exercise the discretion to cancel the applicant’s visa. Counsel submitted that the decision in *CSH18* has application in the present matter even though the present matter involves a decision of the Tribunal in respect of a “Part 5-reviewable decision” and not a “Part 7-reviewable decision”, as was the case in *CSH18*. Having considered the question the Court cannot discern any basis for distinguishing the present matter. The provisions of s 349 of the Act, which governed the review carried out by the Tribunal in this matter, are relevantly identical to those in s 415 of the Act, which was considered in *CSH18*. There is no basis to conclude that the absence of effective delegation from the Minister gave rise to any jurisdictional error on the part of the Tribunal in reviewing the decision of the officer.

101 In a series of decisions, the Federal Court has determined that the Tribunal has the power to carry out a review of a decision to cancel a visa, even in circumstances where the decision the subject of its review involves jurisdictional error arising from a failure to comply with the requirements of the Act prior to the exercise of such power: *Zubair v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2004) 139 FCR 344; [2004] FCAFC 248 at [28] – [32]; *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Ahmed* (2005) 143 FCR 314; [2005] FCAFC 58 at [33] – [44]; *Uddin v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (2005) 149 FCR 1; [2005] FCAFC 218 at [55]. In considering that question, no relevant distinction has been drawn by the Federal Court between decisions concerning the grant and refusal of visas and those concerning the cancellation of an existing visa.

102 The Court has also considered the question of whether the Tribunal erred in any respect in the manner it dealt with the s 375A certificate, notwithstanding the applicant had not himself

raised any ground in connection with that matter. The Tribunal recorded (at [17]) that it provided the applicant a copy of the certificate, and (at [19]) that it noted the gist of the information in the documents the subject of the certificate. The applicant did not seek to challenge the validity of the certificate before the Tribunal, nor did he advance any argument to the Court about the certificate or the Tribunal's approach to dealing with the material the subject of the certificate. Although in his response to the notice of intention the applicant submitted that the birth certificates were based on fraudulent information, that claim was not supported by any evidence, and does not appear to have been maintained by the applicant when he reached the Tribunal. The applicant did not deny the existence of the children or assert that he was himself the father of those children. No error in the manner in which the Tribunal dealt with either the certificate or the information and documents caught by it is disclosed.

103 As the applicant has not demonstrated that the Tribunal fell into jurisdictional error, the application must be dismissed.

104 The Court will hear the parties as to costs.

I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Doust.

Associate:

Dated: 28 March 2025